CONSTITUTIONAL ASPECTS OF THE FEDERAL TAX ON THE INCOME OF CORPORATIONS.

AT the instance of President Taft, Congress at its special session inserted in the Tariff Act a section levying a tax commonly called the federal corporation income tax. It was the common report that the section was drafted by Attorney General Wickersham and passed upon by Senator Root and others, so that any criticism of its constitutionality must be made with considerable diffidence. It was also common report that this particular form of tax was selected instead of a general income tax, not only because the leaders were less fearful of its economic effects, but as well because the constitutional lawyers of the Senate were doubtful as to the fate at the hands of the court of a general income tax, and very properly desired to avoid presenting to the court a question at once so embarrassing and so likely to embroil the court in political and economic controversy.

That the drafters have succeeded in enabling the court substantially to reverse its decision in the case of Pollock *v.* Farmers' Loan & Trust Co.[1] without appearing so to do, and have consequently forestalled much popular agitation, is unquestionable. But whether they have drafted a tax which in fact does differ from the tax considered in the Pollock case, in the qualities that differentiate a direct from an indirect tax, is a matter of much interest and some doubt.

The Constitution contains in Article I the following provisions relating to taxation:

Section 2, par. 3. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."

Section 8, par. 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."

Section 9, par. 4. "No Capitation, or other direct, Tax shall be laid,

[1] 157 U. S. 429.

unless in Proportion to the Census or Enumeration herein before directed to be taken."

Since the Pollock case, there has been such doubt concerning the exact meaning of the phrase "direct tax" that a brief reconsideration of the historical evidence concerning its meaning and the early judicial interpretation of it may be pardoned.

In the first place, it is noticeable that the Constitution in the section conferring upon Congress the power of taxation does not use the phrase "direct taxes"; but distinguishes "taxes" from "duties, imposts and excises." So also, while it is provided that "direct taxes" shall be apportioned, it is not provided, as might be expected, that "indirect taxes" shall be uniform throughout the United States; but that "duties, imposts and excises" shall be uniform throughout the United States. It would appear that "duties, imposts and excises" were intended to describe all taxes not described by the word "tax" or by the phrase "direct taxes," and consequently that the word "tax" and the phrase "direct taxes" were used synonymously; and so it has been held.[2]

The task of interpretation must therefore be to discover what was the meaning common to each of these terms at the time the Constitution was adopted.

The English statutes at once reveal the meaning of the word "tax." The land tax, which was the common tax of that period and was a tax levied on landowners and measured by the value or amount of the land, was invariably in the English statutes and in the books called a "tax." All other levies were called either duties or imposts or excises, but generally duties.[3] It should, however, be remarked that no tax on the income derived from land, or indeed on any incomes, had been levied in England, and consequently that this tax had not been classified as either a tax or a duty in English law. This distinction was well known to English lawyers, and, of course, to American lawyers who depended upon the English laws and statute books for a large part of their law. It was definite, easily understood, and applied and worked substantial justice when read into the federal Constitution.

There is nothing, however, in the English statutes which serves

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[2] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.

[3] See article by Edward B. Whitney, 20 HARV. L. REV. 280.

to explain the phrase "direct taxes"; and for this purpose recourse must be had to the writings of the economists. Apparently the first noticeable use of the phrase "direct tax," and the first attempt to define that phrase, was made by the physiocrats, the prominent, indeed orthodox, school of French economists of the latter half of the eighteenth century. Like the English economists of the eighteenth century their speculations turned mainly upon the question of whether taxes were shifted from the persons actually paying the tax to others, and if so to whom. Their answer, which had many years before been outlined by Locke, was that all taxes were finally shifted upon and really paid by the landowners; and consequently they divided taxes into two great classes, — those which fell directly upon the ultimate taxpayer and could not be shifted, which were called "direct taxes"; and those which fell directly upon other members of the community, but which by the shifting process indirectly fell upon the landowners. The result of this was that they classed taxes on land and on the income derived from land as "direct taxes," and together with capitation taxes these were the only "direct taxes" recognized by this school.

The only other classification of taxes into "direct" and "indirect" which had been published prior to the adoption of the Constitution, was contained in Adam Smith's revolutionary work, the "Wealth of Nations," published in 1776. Adam Smith attacked the fundamental propositions of the physiocrats, demolished their theory that all taxes were shifted to the landowners, and conceding that taxes were shifted, proceeded himself to consider which taxes were and which were not shifted, classifying those that were as "indirect" and the others as "direct." Among others, he classed all income taxes among "direct taxes."

Proceeding now to consider which of these definitions was in the minds of the members of the convention, we can at once affirm that the phrase was used in the Constitution in its specific sense to denote certain taxes; rather than in its general sense to denote non-shiftable taxes. It was in this specific sense that it was commonly used by the physiocrats. During the eighteenth century there had been current numerous different theories, each with its band of advocates, as to what taxes could or could not be shifted; and doubtless this must have been known to the framers of the Constitution. It is utterly contrary to our conception of these

statesmen to suppose that they would insert in the Constitution a phrase with a meaning which differed according as one accepted one or another theory of economics; and it is beyond the bounds of possibility to suppose that this would have been done without any debate or discussion concerning the meaning of the phrase, as apparently was the case. The entire absence of any debate over the meaning of this phrase is the most emphatic evidence that it was well understood to have a definite meaning denoting certain specific taxes. Finally, that the word "tax," which had never been used or defined to denote non-shiftable taxes, and which had a well-known meaning in English law, was used synonymously with the phrase "direct tax," absolves any doubt concerning this.

It is equally evident that the convention did not have in mind the classification of taxes made by Adam Smith. The "Wealth of Nations" was only published eleven years prior to the framing of the Constitution, propounded revolutionary doctrines, and had not, so far as the evidence shows, been generally accepted or even generally read. It would be extraordinary that elderly statesmen framing a constitution, who were familiar with the language of the English law and who very largely received their notions of taxation and economics from the English law and the teachings of the physiocrats, — it would be nothing short of extraordinary, that they should adopt a revolutionary theory and embody it in a constitution. That they should have done so without even discussing the matter is almost inconceivable.

We must therefore choose from either the physiocratic or the legal classification. The two are identical, except that the former included capitation taxes and taxes on the income derived from land among "direct taxes," whereas the latter had been used in the English statutes to describe only the tax on land. However, as Parliament had never levied either a tax on the income derived from land or a capitation tax, it is not certain that these would have been classed as "duties." What is more natural than that the framers of the Constitution should assume that the legal word "tax" and the phrase "direct tax" used by the physiocrats referred to the same class of taxes, and that they should use this word and this phrase which had this definite and, as they assumed, identical meaning?

It is impossible to hold that they did not consider the economist's

definition, since that would leave the phrase "direct taxes" unaccounted for. Further, that "capitation taxes" were expressly included among "direct taxes" shows that the physiocrat's classification was meant to be adopted in the Constitution.

It was ably contended by counsel for the appellant in the Pollock case, that among "direct taxes" were also included a general tax on personal property and a tax on incomes; citing in support thereof, among other authorities, Alexander Hamilton's classification in his brief in the Hylton case, and the many remarks from Elliott's Debates tending to show that direct taxes were supposed to refer to the internal taxes theretofore customarily levied by the states.[4] These remarks, however, were by no means unequivocal, and it is extremely doubtful if they represented the sentiment of the convention. There is no evidence that the taxes levied by the states were commonly called "direct taxes," and consequently this forms a most insecure ground upon which to base a definition of this phrase, which is foreign to the usage of the economists and the English law, and which apparently was not current in this country. It is consequently reasonably apparent that the only taxes which were intended to be apportioned were taxes on land, on income from land, and capitation taxes, all of which can be equally well and justly apportioned.

Turning now to the decisions construing this phrase, we find confirmation for this view. Prior to 1895 no federal tax had ever been held by the Supreme Court to be a "direct tax." A tax on carriages,[5] a tax on insurance and the income of insurance companies,[6] a tax on banknote circulation,[7] a succession tax,[8] and finally a tax on incomes,[9] have been held to be not "direct taxes." Throughout these cases the Supreme Court has iterated and reiterated, and finally based its holding upon the proposition that the only "direct taxes" are a capitation and a land tax. But nowhere has the court defined what is meant by "land tax." Commonly, of course, this means a tax on land, *i. e.*, a tax on a person because of the ownership of land. But in a broad sense it may include any

[4] See report of argument in Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429.
[5] Hylton *v.* United States, 3 Dall. (U. S.) 171.
[6] Pacific Insurance Co. *v.* Soule, 7 Wall. (U. S.) 433.
[7] Veazie *v.* Fenno, 8 Wall. (U. S.) 533.
[8] Scholey *v.* Rew, 23 Wall. (U. S.) 331.
[9] Springer *v.* United States, 102 U. S. 586.

tax upon land or its increment, and hence a tax upon income from land. There is in none of these cases anything clearly inconsistent with such a definition.

The case of Pollock *v.* Farmers' Loan & Trust Co. injected an entirely novel factor into the situation. It was a bill in equity by a stockholder of the Farmers' Loan & Trust Co. praying for an injunction against the company and its directors, enjoining them from paying to the United States Collector of Internal Revenue the income tax imposed by §§ 27–37 of the Tariff Act of 1894. The case was argued with the case of Hyde *v.* Continental Trust Co., which involved substantially the same facts. Attorney General Olney and Mr. Edward B. Whitney, then Assistant Attorney General, were allowed to intervene on behalf of the United States, and with James C. Carter, at that time the leader of the New York bar, who appeared for the Continental Trust Co., supported the constitutionality of the act. Opposed to them were Joseph H. Choate, who was then challenging Mr. Carter's leadership of the bar in New York, Senator Edmunds, Clarence A. Seward, and William D. Guthrie.

The bill of complaint alleged, among other things, that the Farmers' Loan & Trust Co. owned certain real estate and certain personal property from which it derived income, and it was contended that a tax upon such income was a "direct tax." Upon April 8, 1895, the court rendered its opinion, in which six of the justices concurred that the statute, so far as it taxed the rents and profits of land, levied a direct tax, and hence, not being apportioned, was unconstitutional. The court was evenly divided as to whether a tax on income from personalty was a direct tax.

Immediately upon the rendition of this opinion, the counsel for Pollock filed an application for a rehearing, in which the Attorney General joined, and which was at once granted by the court. Thereupon a reargument of the entire case was had, resulting in a decision from which four justices dissented, holding the entire income tax unconstitutional.

The rulings were based upon the following grounds:

1. That the framers of the Constitution regarded all taxes on real estate or personal property or the rents or income thereof to be direct taxes.[10]

[10] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 573–574.

2. That there is no logical distinction between an income tax which in part falls on the rents of land, and a tax on land *eo nomine* or upon its owners in respect thereof, whence it follows that an income tax which falls in part on the rents of land is to that extent a direct tax.[11]

3. That there is no distinction, so far as any qualities of directness are concerned, between a land tax and a tax on personalty, and hence the same consequences follow.

That the court was right in its conclusion that a tax on the income from land was direct is evident from the preceding discussion; and it is equally evident, if the foregoing analysis is correct, that the court was wrong in its decision that a tax on personalty or its income was direct. It is at least probable that the case will remain authoritative upon the first proposition, but that it will ultimately be overruled as to the second.

Of the cases that have arisen since the Pollock case, construing the meaning of the phrase "direct taxes," none, with the possible exception of the latest, have overruled that case. In Knowlton *v.* Moore [12] the court sustained an unapportioned succession tax upon the inheritance of land. This case establishes that Adam Smith's definition of a "direct tax" as a tax which cannot be shifted, is not the constitutional definition, and was not held so to be in the Pollock case, and consequently virtually overrules the holding of the Pollock case that a tax on personalty or its income is a direct tax.

The cases of Nicol *v.* Ames,[13] holding a tax upon sales of merchandise at exchanges to be not direct; and of Thomas *v.* United States,[14] holding a stamp tax on a memorandum or contract of sale or a certificate of sale to be not direct; and the case of Patton *v.* Brady,[15] holding an excise on tobacco in the hands of the manufacturer or seller to be not direct, — are easily distinguishable from the Pollock case, and are not important in considering the character of the recent corporation tax.

Finally, there is the case of Spreckels Sugar Refining Company *v.* McClain,[16] which will play a most important part in litigation over this new tax. There was presented for the court's considera-

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[11] 157 U. S. 429, 579–581; 158 U. S. 601, 637.
[12] 178 U. S. 41.
[13] 173 U. S. 509.
[14] 192 U. S. 363.
[15] 184 U. S. 608.
[16] 192 U. S. 397.

tion one section of the late war revenue act which provided as follows:

"That every person, firm, corporation or company carrying on or doing the business of refining petroleum, or refining sugar . . ., whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one *per centum* on the gross amount of all receipts of such persons . . . in their respective business in excess of said sum of two hundred and fifty thousand dollars."

The Spreckels Company, which was engaged in refining sugar, was taxed upon its gross receipts, which included receipts received for the use of its wharves by vessels unloading sugar, and income from capital invested in other concerns and not then required in the sugar business. The suit was brought to recover the taxes so paid. It did not appear that the wharves from which the company received rent were built upon its own real estate, and in the briefs this was not regarded as rent from land; but, together with the income from invested capital, was regarded by the plaintiff's counsel as income or receipts from personalty.

Two questions therefore were presented:

(1) Whether the tax so far as it fell on the receipts from the wharves and the investments was direct.

(2) Whether the tax so far as it fell on the receipts from the sale of sugar and other factors of the sugar business was direct.

Probably owing to the fact that only an insignificant amount was involved, the first point was virtually disregarded by the counsel and the court. Indeed, Mr. Johnson, counsel for the sugar company, devotes only a short paragraph in his brief to a bare statement, which he does not support by the slightest argument, that the tax so far as it is levied upon these receipts is direct, and the Solicitor General makes no mention of the separate problem raised by these receipts, but confines himself to a discussion of the second question. It is consequently not remarkable that the court failed to consider this problem; and so far, therefore, as this case decided that a tax on receipts from wharves and investments is not a direct tax, it is hardly a satisfactory or weighty ruling, although it may presage a return to the doctrine so frequently propounded prior to the Pollock case. Since it nowhere appeared that the wharves were real estate, it cannot be regarded as affecting the ruling of

the Pollock case upon the question of a tax on income from land.

The considered holding of the court in the Spreckels case, that a tax upon the gross receipts derived from sales of sugar was an excise, was clearly correct and not in conflict with the Pollock case. Taxes upon articles held in the manufacturer's hands for sale have since the earliest times, and even by Blackstone, been classed as excises. The Pollock case was founded on the taxation of personalty in the hands of the ultimate owner, and not in the hands of an immediate seller.

The questions presented by the present law are whether this tax is within the Pollock case, a tax on income from land or from personalty; and if so, what will be the consequences concerning its validity.

The law so far as material to this discussion reads as follows:

"SEC. 38. That every corporation, joint stock company or association . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company, equivalent to one *per centum* upon the entire net income over and above five thousand dollars received by it from all sources during such year."

At the outset it is noticeable that the tax is expressed to be an "excise on the doing of business." While it may be conceded that such a description is material in determining the exact nature of the tax, yet it is not conclusive. Whether this tax is an excise tax on business, or whether it is a tax on land or on personalty within the reasoning of the Pollock case, must depend upon its real nature, to be discovered by ascertaining its attributes or characteristics. If it possesses all the attributes or characteristics of an excise on business, then certainly it must be held to be such a tax, irrespective of what name Congress has given it. So, also, if it possesses all the attributes or characteristics of an income tax, such as is a direct tax within the reasoning of the Pollock case, it should be held to be such a tax.

The instances are numerous in which the Supreme Court has held that in deciding upon the constitutionality of a tax it will look at the real nature of the tax and will not consider the name given

to the tax by the legislature as conclusive. In Home Savings Bank *v.* Des Moines [17] Mr. Justice Moody says:

"The first step useful in the solution of this question [whether bonds of the United States have been taxed by the state] is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the state. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans *v.* Houston, 119 U. S. 265, 278, and Home Insurance Co. *v.* New York, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes the property itself."

So also in the case of New York Central Railroad Company *v.* Miller,[18] Mr. Justice Holmes, considering a tax of the State of New York expressed to be a "corporation franchise tax," which was computed upon the basis of the amount of capital stock of the corporation employed within the state, said at page 596:

"It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on property of a corporation in Delaware, Lackawanna, & Western R. R. *v.* Pennsylvania, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case."

The learned judge thereupon considers the validity of the tax upon the theory that it is a property and not a franchise tax.

In Parker *v.* North British Ins. Co.[19] the Louisiana court, construing a statute, said:

"It is vain to call gross receipts 'capital'; they are not capital or capital stock, and no legislative declaration can make them so." [20]

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[17] 205 U. S. 503, 510. [18] 202 U. S. 584. [19] 42 La. Ann. 428.

[20] See also Ferry Co. *v.* Kentucky, 188 U. S. 385. A Kentucky tax on the "Kentucky franchise" of the Ferry Company between Kentucky and Indiana, holding

The first consideration must be to classify this tax. Not only will the question whether this tax is properly classified as an income tax or an occupation tax be most important in determining its constitutionality, but such a consideration will reveal the real attributes of the tax, which will facilitate the application of the principles adjudged proper in the Pollock case to determine what is and what is not a direct tax.

A tax is commonly described as being "on" some subject matter. But what it is which in difficult cases determines just what factor the tax is "on," has never been clearly defined. A tax on all persons who own land, of one per cent of the value of their land, can be at once classified as a tax on land. On the other hand, a tax on persons possessing red hair, of one per cent on the value of the land owned by them, is classified with some difficulty. Is it a tax on land? Or is it a tax on red hair? Or is it both? Or is it merely a tax on a particular class of land, to wit, land owned by red-haired persons?

Taxation is the taking by the state from the citizens of the state, or from persons within it or whose property is within it, of the necessary means for its support. It is accomplished by forcing the above-described persons to pay the state a certain contribution estimated in various ways, which may be done by forcibly taking from the citizen a certain portion of his property. Not only in theory is it a contribution to the state from its citizens or from aliens, but as a practical matter this must be so, since all property within the state is owned by citizens or aliens.

Generally, taxes are not levied upon all, but only upon a part of the persons subject to the taxing power, and hence almost every taxing statute has provisions which limit the class of persons from whom the tax is to be collected. Those provisions may comprise one or more factors, which may in theory be anything which is

a franchise from both states, based upon the capitalization and earnings of said company was held to be a tax in part on the Indiana franchise. United States *v.* The Railroad Company, 17 Wall. (U. S.) 322; Bank of Commerce *v.* New York, 2 Black (U. S.) 620; Bank Tax Cases, 2 Wall. (U. S.) 200; Western Union Telegraph Co. *v.* Mass., 125 U. S. 530, holding that a tax on each corporation upon its *corporate franchise* at a valuation equal to the aggregate value of its shares of capital stock, is a tax upon the property and not upon the franchises of the corporation; City of Brookfield *v.* Tovey, 141 Mo. 619; Millerstown *v.* Bell, 123 Pa. St. 151; Harrisburg *v.* East, etc. Co., 4 Pa. Dist. Ct. 683. But see *contra*, Home Ins. Co. *v.* N. Y., 134 U. S. 594, where a tax on the corporate franchise equal to a certain per cent on the capital stock was held a tax on the franchise.

descriptive of persons. Thus, conceivably, they may be classified for taxation according to their ownership of land, or to their possession of red hair, or a large nose, or more than three suits of clothes, or according to their possession of all these factors.

That factor or those factors, for there may be more than one, which determine whether or not a person comes within or without the class taxed, are necessarily the particular factors against which the amount of the tax is charged by the taxpayer. If the possession of that factor is not of sufficient worth to the taxpayer to compensate him for the amount of the tax, he will rid himself of it, if he is able. The consequence is that as a practical matter the tax is a burden upon the factor or factors which determine the class of persons upon whom it shall be levied; and so may very properly be said to be a tax upon that factor, or upon those factors if there are several.

It is of course a simple matter to determine what in any given case are the factors which are the conditions of the levy of the tax. Very frequently, as in this case, the tax is *expressed* as being levied upon certain factors. But these factors upon which the tax is expressed as being levied are not always the only factors which determine whether or not a particular tax shall be levied. Every tax must necessarily specify some measure by which the amount of the tax will be determined; and that factor which measures the tax is always one of the factors which determine the levy or non-levy of a tax, since, if there is nothing upon which to measure the tax, no tax can be collected. Thus a tax on every person of one per cent on the value of his land is a tax on land, since it is the possession of land which determines whether or not a given person comes within the class of persons taxed. This has been frequently recognized by the courts, which may sometimes have laid undue stress upon this factor.

Thus in Dobbins *v.* Commissioners of Erie County [21] the court says, in answer to an objection that a certain tax was a tax upon the person of the officer and not upon the office:

"The first answer to be given to these suggestions is, that the tax is to be levied upon a valuation of the income of the office."

So also in the State Tonnage Tax cases,[22] the court, in holding that a state tax on vessels measured by the tonnage thereof was a tonnage tax, says:

[21] 16 Pet. (U. S.) 435, 445.

[22] 12 Wall. (U. S.) 204.

"Attempt was made in the case of Alexander *v.* Railroad to show that the form of levying the tax was simply a mode of assessing the vessel as property, but the argument did not prevail, nor can it in this case, as the amount of tax is *measured* by the tonnage of the steamboats, and not by their value as property." [23]

This, however, is by no means a conclusive test, since it does not account for any specific taxes, and since the legislative body may measure the tax by some value entirely divorced from the persons taxed, — as, for instance, one thousandth of one per cent of the national debt. So, too, when several factors must coexist in order that the tax be leviable, this test fails to reveal all of these factors. All that can be said is that as a practical matter it is generally a sound test to discover one of the subject matters of the tax.

The new federal tax is expressed to be on corporations *doing business*, and is measured by the *net income* of such corporations. There are therefore three factors which determine whether the tax shall be levied, — (1) existence as a corporation, (2) doing business, (3) the receipt of a certain income. Unless all of these three are present in a given case, no tax is levied; if they are all present, a tax is levied.

Therefore according to the rules laid down above, this tax is a tax upon those several factors. The tax can be avoided by ridding oneself of any one of these factors. It must therefore be held to

[23] New York Central Ry. Co. *v.* Miller, 202 U. S. 584, a corporation franchise tax computed upon the basis of the amount of the capital stock of a corporation was held to be a tax on the property of a corporation; Society for Savings *v.* Coite, 6 Wall. (U. S.) 594, a tax equal to three-fourths of one per cent on the total amount of deposits held by banks is a tax upon the franchise and not upon the property, since the tax is measured by the amount of the business done, to wit, the amount of deposits; Providence Institution *v.* Mass., 6 Wall. (U. S.) 611, a tax on a savings bank on account of its deposits is a tax on its franchise; Western Union Telegraph Co. *v.* Mass., 125 U. S. 530, a tax upon corporate franchises at a valuation equal to the aggregate value of the shares of its capital stock at a specified rate thereupon, was held to be a tax on the property and not on the franchise; City of Brookfield *v.* Tovey, 141 Mo. 619, a city ordinance punishing merchants for selling goods without a license and providing for the issuance annually of a license upon payment to city treasurer of one per cent upon the cash value of the goods of the licensee, was held to levy a tax on the property and not to be a license tax on the occupation. See *contra*, Home Ins. Co., *supra*, 134 U. S. 594, where a tax on the franchise of a corporation based upon a percentage of the capital stock of said corporation, was held to be a franchise tax; Delaware R. R. Tax, 18 Wall. (U. S.) 206, a tax of one-fourth of one per cent on the actual cash value of every share of stock to be paid by the corporation, was held not to be a tax on the property of the corporation.

be not a tax upon any one factor separately, but upon all factors jointly; it must be charged up against those factors jointly and must be a burden upon them jointly. It is not a simple occupation tax, whose only factor is the conduct of an occupation; nor is it a simple tax on income, since that factor alone does not determine its levy or non-levy. It must be treated by the court as a complex tax upon "the net income of corporations which are engaged in business."

It is therefore clear that it is not identical with the income tax, which was considered direct by the Supreme Court in the Pollock case; but while it cannot be described as a general income tax, it is nevertheless a particular kind of income tax, just as it is at the same time a particular kind of a tax on business, to wit, on business carried on by corporations which are in receipt of a certain income, and consequently has many of the attributes of the tax declared to be direct in the Pollock case.

Like the income tax of 1894 it is levied only on those corporations doing business who are in receipt of income, is measured by the amount of income, and consequently is a charge against income. The one difference is that the former act applied to all incomes, whereas this act applies only to the incomes of corporations doing business; or, in other words, whereas in the case of the act of 1894 the receipt of income was the only factor which served to bring persons within or without the tax, here there are three factors, — being a corporation, doing business, and receiving income. Yet because of the necessity of these two other factors, does this tax any the less truly belong to the great class of income taxes, and has it not the same attributes of "*directness*" that are characteristic of an income tax?

Suppose for a moment a corporation carrying on the business of a trust company, which purchases a piece of land for its office, builds a large office building on the land, and rents whatever space it does not use for its own purposes. This company derives a part, perhaps a very considerable part, of its income from the rent of offices in its building. The federal tax collector demands and receives a tax of one per cent upon all its income, in which this rent is included. Surely in such a case this is a tax on the income derived from land. It has the same effect upon the land and its income as did the tax declared direct in the Pollock case. It is true that the legislature

did not single out and tax income from land at a separate rate and in a separate statute; but is this material? A general tax upon all property would certainly be held direct so far as it fell on land; and so must a general tax on incomes which falls upon income from land, as was held in the Pollock case. If the court holds this tax to be not direct in so far as it falls upon the rents of land, it will seem not only to be directly overruling the Pollock case, but to be disregarding the best evidence concerning what the framers of the Constitution had in mind.

The same conclusions apply to this tax so far as it may be levied upon income from personalty; but since the court's holding upon this point in the Pollock case is doubtful, and since it has virtually overruled itself in a later case, which, however, as has been pointed out, is not a weighty ruling, it is quite likely that it will not follow the Pollock case upon this.

Whatever action the court might be disposed to take regarding the Pollock case, when confronted with a set of facts identical with those presented by that case, need not be considered. While, as we have shown above, this tax is, so far as the quality of directness is concerned, essentially like the income tax of 1894, it has numerous incidental differences, — notably the description of the tax as an excise upon the doing of business, — which the court may seize upon as the ground of a distinction from the Pollock case. The Spreckels case furnishes an excellent basis for such a distinction; and the language of the Pollock case concerning certain earlier cases reënforces this.

Thus the court distinguished Pacific Insurance Co. *v.* Soule,[24] in which a tax upon the insurance done by, and the income of, an insurance company was held not to be a direct tax, on the ground that a tax "upon the business of an insurance company" was "a duty or excise." Yet in the Soule case part of the tax sustained was a tax upon the income of corporations.

So also the court in the Pollock case[25] refers to the case of Railroad Company *v.* Collector[26] as follows:

"In Railroad Company *v.* Collector, 100 U. S. 595, 596, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be 'essentially an excise on the business of the class

[24] 7 Wall. (U. S.) 433. [25] 157 U. S. 429, 578. [26] 100 U. S. 595.

of corporations mentioned in the statute.' And Mr. Justice Miller, in delivering the opinion, said: 'As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.'"

Whether the court will seize upon such a distinction to sustain this tax will depend very largely upon its opinion of the ultimate wisdom of the holding of the Pollock case. The difficulty of harmonizing a decision upholding this statute and the Pollock case can hardly be unnoticed by the court. If the court were of opinion that the fundamental reasoning of the Pollock case is sound, it would doubtless annul the new tax; but if the court views with disfavor the decision of the Pollock case, it can virtually overrule that case without seeming to do so, by relying upon the authorities last cited.

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